

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS LEE MARTIN,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274619

Macomb Circuit Court

LC No. 2005-003827-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110(a)(2), and was sentenced to a prison term of 18 months to 20 years. He appeals as of right. We affirm.

Defendant's conviction arises from a break-in during the early morning hours of August 7, 2005, at the complainant's first-floor apartment. The complainant saw the head of the perpetrator as he stood at the entry of her bedroom. After he fled, she discovered that her VCR and the tape of her wedding were missing. At trial, she identified defendant as the perpetrator, although she did not do so at the preliminary examination because she was scared. A woman standing on the balcony of another apartment saw defendant running and carrying something that had a cord. The police recovered the VCR, with the tape inside, from defendant's apartment.

Officer Richard Heins testified concerning his tracking dog, Morgan. Morgan followed a scent from the complainant's apartment to an area approximately 100 yards away, where the police saw defendant emerge from behind a grill on a patio. After the police handcuffed defendant, he said, "Why am I under arrest? You can't prove anything." He told Officer Heins that the dog "sucks" and had passed right by him. He also said that he would kill the dog.

On appeal, defendant argues that he was denied the effective assistance of counsel because trial counsel expressed satisfaction with the court's jury instructions despite the absence of an instruction concerning the use of tracking dog evidence.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate

that counsel's deficient performance was prejudicial by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, pp 302-303 (citation and internal quotation marks omitted).

A trial court has a duty, even absent a request by counsel, to inform the jury that tracking dog evidence must be considered with great care, is of slight probative value, and cannot support a conviction in the absence of other evidence of guilt. *People v Perryman*, 89 Mich App 516, 524; 280 NW2d 579 (1979). See CJI2d 4.14. The trial court did not instruct the jury with respect to this evidence. Assuming *arguendo* that counsel's failure to object to the absence of the instruction fell below an objective standard of reasonableness, we are not persuaded that there is a reasonable probability that the result of the proceeding would have been different had the jury received the instruction. The instruction had no bearing on other key evidence that linked defendant to the crime, specifically, the presence of the complainant's VCR, bearing her wedding tape, in defendant's apartment and the eyewitnesses' identification of defendant. Because defense counsel's conduct was not prejudicial, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski